

TERMS AND CONDITIONS FOR CONSTRUCTION AND RECLAMATION TIME AND MATERIALS CONTRACTS

WV DEPARTMENT OF ENVIRONMENTAL PROTECTION

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**DEPARTMENT OF ENVIRONMENTAL PROTECTION
TERMS AND CONDITIONS
FOR
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TIME AND MATERIALS CONTRACTS**

The titles or headings of the sections and subsections are intended for convenience of reference and shall not be considered as having any bearing on their interpretation except those titles and headings used in conjunction with the definition of terms.

1. ABBREVIATIONS & DEFINITIONS

ADDENDUM – A document or information attached or added to the contract to clarify, modify or support the information contained therein. An addendum issued by the Department during the bidding process becomes part of the contract documents when the contract is awarded.

ADVERTISEMENT – The public announcement, as required by law, inviting bids for work to be performed or material to be furnished.

AMENDMENT – A change to the contract made by adding, altering or omitting a certain provision or term. An amended contract retains the legal validity of the original contract.

AWARD – The Department's notice to a bidder of its acceptance of the submitted bid.

BLACKOUT PERIOD – From the time a requisition is submitted to the DEP Purchasing section for public advertisement until an award is made, evaluators and DEP employees are not permitted to communicate with vendors/contractors about the solicitation or any component thereof without prior approval from the DEP Purchasing Section. All vendors/contractors must direct all communications regarding the solicitation to the DEP Purchasing Section until the agency has issued an award.

BID – Anything that a vendor submits in response to a solicitation that constitutes an offer to the Department and includes, but is not limited to, documents submitted in response to a request for quotation, proposals submitted in response to a request for proposal, or proposals submitted in response to an expression of interest.

BIDDER – An individual, firm, corporation or combination thereof, acting directly or through a duly authorized representative, submitting a bid for the proposed work.

BID BOND – A bond in which a third party agrees to be liable to pay a certain amount of money in the event a selected bidder fails to accept the contract as bid. Pursuant to the requirements contained in W.Va. Code § 5-22-1 (c), all vendors submitting a bid on a construction project shall furnish a valid bid bond in the amount of five percent (5%) of the total amount of the bid protecting the State of West Virginia. The bid bond must be

submitted with the bid.

CALENDAR DAY – Every day shown on the calendar.

CONSTRUCTION – The clearing, dredging, excavating, grading of land and other activities associated with the reclamation of property once used to extract coal, oil or natural gas or operate landfills in this State.

CONTRACT ADMINISTRATOR – A person authorized by the Cabinet Secretary to be responsible for the management of contracts, including approval of any necessary changes that may be needed over the course of the contract. The Department will identify the contract administrator for each awarded contract. Vendors should rely only upon written notification by the Contract Administrator of changes to the scope of work or approval of change orders.

CONTRACT PERIOD – The period from the specified date of commencement of work to the specified date of completion of the work, both dates inclusive, as is specified in the contract.

CONTRACTOR – Every person, individual, firm or corporation, including a subcontractor, who agrees, by written contract, to engage in a construction project for the Department.

DEPARTMENT – West Virginia Department of Environmental Protection.

EMPLOYEE – Any person working on behalf of the project who is under the direction of the contractor or any subcontractor.

ENGINEER – A person employed by the Department who is qualified to practice engineering per W.Va. Code § 30-13-1, et seq. and is authorized by the Cabinet Secretary to administer the engineering components of reclamation and construction contracts, limited by scope of duties assigned.

EQUIPMENT – All machinery, tools, and apparatus necessary for the proper construction and acceptable completion of the work, together with the necessary supplies for upkeep and maintenance of the same.

ESTIMATE – The official written itemization of the approximate calculation or judgment of the value of materials in place and work performed.

HOLIDAYS – State holidays an observed day of recreation when no work is done.

INSPECTOR – The Department's authorized representative assigned to make any or all necessary inspection of the work as further described below.

ITEM – A specifically described unit of work for which a price is provided in the contract.

LOWEST QUALIFIED RESPONSIBLE BIDDER – The bidder who bids the lowest price and that meets, as a minimum, all the following requirements in connection with the bidder's response to the bid solicitation. The bidder must certify that it:

- a. Is ready, able, and willing to timely furnish the labor and materials required to complete the contract;
- b. Is in the compliance with all applicable laws of the State of West Virginia; and
- c. Has supplied a valid bid bond or other surety authorized or approved by the Department.

MATERIALS – Any apparatus, equipment, parts or supplies (as distinguished from employees) specified for use in the construction of the project. Materials testing will be addressed in the Technical Specifications.

NOTICE TO PROCEED – A formal written communication most often used in construction contracts to establish the date for work to commence and determines the date for completion.

PRODUCT DATA – Illustrative data, brochures, schedules, catalog cuts, charts, informative material or specifications to illustrate materials, articles, items or products for use in some portion of the work.

PROJECT – A planned set of interrelated tasks to be executed over a fixed period and within certain cost and other limitations. For purposes of this document, "project" means the venture undertaken pursuant to the contract.

SAMPLES – Physical examples that show and illustrate materials, finishes, equipment or workmanship of products proposed for use in some portion of the work.

SEASONAL RESTRICTIONS – Limitations imposed on the work which prohibit the Contractor from performing certain types of work during specific seasons of the year.

SHOP DRAWINGS – Drawings, diagrams schedules, and other data prepared for the project by the Contractor, subcontractor, manufacturer or supplier to illustrate and/or install some portion of the work.

SOLICITATION – An attempt made by the Department to obtain bids or proposals for the purpose of entering into a contract, which attempts may include Requests for Quotations (RFQs), Requests for Proposals (RFPs) or other documents approved by the Department.

SOLICITATION RESPONSE – A written answer from a vendor to a solicitation made by the Department, usually made in the form of a bid on a contract.

SPECIFICATIONS – A general term applied to all directions, provisions, and requirements pertaining to performance of the work.

STATE – The State of West Virginia.

SUBCONTRACTOR – A secondary contractor who contracts with the primary Contractor, not the Department, to perform some or all of the primary Contractor's obligations under the contract.

SUPERINTENDENT – The Contractor's authorized representative in responsible charge of the work.

SUPPLEMENTAL SPECIFICATIONS – Additions to and revisions of the Standard Specifications that are included in the solicitation for a specific project. Supplemental Specifications prevail over Standard Specifications when in conflict therewith.

SURETY – The corporation, partnership or individual (e.g. a bank, bonding company or insurance company), other than the Contractor, that is a guarantor of payment or performance if the Contractor fails to perform all of its obligations under the contract.

UNBALANCED BIDDING – refers to the practice of pricing individual line items on a bid sheet at more (or less) than what the bidder would normally offer. The bidder believes that the owner will actually use more or less of the item than is provided in the bidding documents. In doing so, the bidder attempts to take advantage of an owner's over or under-estimation.

VENDOR SELF-SERVICE (VSS) PORTAL – A computer program that allows the vendor to access data regarding the State purchasing process. In West Virginia, this feature incorporates the vendor registration function as well as the West Virginia Purchasing Bulletin, which includes commodities and services currently out for bid. The VSS portal also allows vendors to receive solicitation notifications by e-mail based on commodities and services noted at the time of registration; review awarded contracts; perform inquiries pertaining to awards; view payment status and update company contact information, including mail and e-mail addresses.

WORK – The furnishing of all labor, materials, equipment, and other incidentals necessary or convenient to the successful completion of the project and the carrying out of all duties and obligations imposed by the contract.

WORKING DAYS – Monday through Friday, but excluding Saturday, Sunday, state holidays and days that governmental offices are closed due to declaration of an emergency.

WORK DIRECTIVE – A written order, signed by the Contract Administrator, providing authorization to the Contractor to proceed with performance of the contract without further instructions or negotiation. This order shall not create new items or make revisions to item prices.

WV OASIS – An enterprise resource planning (ERP) system used by the State to

process all financial transactions, including procurement.

2. VENDOR REQUIREMENTS AND CONDITIONS

2.1 DISQUALIFICATION OF BIDDERS

The Department shall not award a contract to any party who has outstanding environmental enforcement actions pending against it for any environmental violation. Further, the Department shall not award a contract to any party who has unresolved vendor complaints, unpaid liabilities outstanding with the Department or the State or who fail to meet any requirements outlined within these specifications or any supplemental specifications associated with an individual solicitation.

The Department reserves the right to request additional information and supporting documentation regarding unit prices when the unit price appears to be unreasonable. An unreasonable bid may result in the disqualification of the bidder.

2.2 wvOASIS REGISTRATION

It is the Contractor's responsibility to complete any wvOASIS VSS Portal registration forms and acquire all the necessary software, hardware, and networking capabilities for the electronic bidding process. All solicitations will be issued electronically in wvOASIS and all bids must be submitted electronically in wvOASIS.

The Contractor shall receive all payments electronically via direct deposit. Prior to award of the contract, the Contractor shall be approved and registered to accept payments electronically through the West Virginia State Auditor's Office. (www.wvsao.gov).

2.3 COLLUSION AMONG BIDDERS

In addition to the requirements stated in Section 3.1, bidders shall be disqualified if there is evidence of collusion among them.

Collusion among bidders means a situation in which companies share information illegally among themselves when offering to supply goods or services, in order to control the price. Participants in collusion will receive no recognition as bidders for any future work of the Department for a period of one year or until those participants found in collusion have been reinstated as qualified bidders, whichever is longer.

When Department personnel believe that collusion among bidders has occurred, the Department will provide written notice to the bidders. Bidders have ten days from the date of notification to respond to the notice, providing credible evidence that no collusion exists. The Department has discretion to determine if the evidence is credible.

2.4 CONTRACTUAL AGREEMENT

Issuance of a Purchase Order signed by the Department and approved as to form by the Attorney General's office, if required, constitutes acceptance of the contract made by and between the Department and the Vendor. The Vendor's electronic signature on its bid signifies its agreement to be bound by and accept the terms and conditions contained in the contract.

2.5 CONTRACT TERM

The term of the contract shall be stated in the specifications for the solicitation.

2.6 QUANTITIES

This is an open-end contract. The quantities listed in the Solicitation are approximate only, based on the Department's estimates and are prepared for comparison of bids. The Vendor understands and agrees that this contract shall cover the quantities actually ordered for delivery during the term of the contract, whether more or less than the quantities shown in the specifications for the solicitation.

2.7 REQUIRED DOCUMENTS

The Vendor shall provide to the Department all of the items identified in the specifications for the solicitation.

2.8 SUBMISSION OF BIDS

The Vendor's submission of its bid in the wvOASIS VSS Portal constitutes an offer to the Department that cannot be unilaterally withdrawn; signifies that the service and goods proposed by the Vendor meet the mandatory requirements contained in the solicitation for that service and goods, unless otherwise indicated; and signifies acceptance of the terms and conditions contained in the solicitation, unless otherwise indicated.

2.9 PRICING

The pricing set forth herein is firm for the life of the contract, unless specified by the Department elsewhere within the solicitation or contract. A Vendor's inclusion of price adjustment provisions in its bid, without an express authorization to do so from the Department in the solicitation, may result in bid disqualification.

2.10 PAYMENT

Payment in advance is prohibited under the contract. Payment may only be made after the delivery and acceptance of the service and goods called for by the contract. The Vendor shall submit invoices in arrears.

2.11 TAXES

The Vendor shall pay any applicable sales, use, personal property or any other taxes arising out of the contract and the transactions contemplated thereby. The Department is exempt from federal and State taxes and will not pay or reimburse for them.

2.12 ADDITIONAL FEES

The Vendor is not permitted to charge additional fees or assess additional charges that were not either expressly provided for in the solicitation published by the Department or included in the unit price bid amount that the Vendor is required by the solicitation to provide. Including such fees or charges as notes to the solicitation may result in rejection of the Vendor's bid. Requesting such fees or charges to be paid after the contract has been awarded may result in cancellation of the contract.

2.13 FUNDING

The contract shall continue for the term stated herein, contingent upon funds being appropriated by the Legislature or otherwise being made available. In the event funds are not appropriated or otherwise made available, the contract becomes void and of no effect beginning on July 1 of the fiscal year for which funding has not been appropriated or otherwise made available.

2.14 CANCELLATION

The Department reserves the right to cancel the contract immediately upon written notice to the Vendor if the materials or workmanship supplied do not conform to the specifications contained in the contract. The Department may also cancel any contract upon 30 days written notice to the Vendor.

2.15 TIME

Time is of the essence with regard to all matters of time and performance in this contract.

2.16 UNBALANCED BIDS

The Agency may reject a bid as nonresponsive if the prices bid is materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Agency even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

Any submitted unit bid item falling outside a reasonable range will require the vendor to provide written justification supporting the need and feasibility of the unit price bid. The Agency will review and determine if submitted justification supports award or disqualification of the contract.

3. CONTENTS AND ISSUANCE OF SOLICITATION

All solicitations will be both published on the VSS Portal Business Opportunities tab and e-mailed to Contractors or to their authorized representatives who are registered for construction and reclamation commodities in the wvOASIS VSS Portal. Vendors

are responsible for assuring that they are properly registered to receive these e-mails from wvOASIS.

All documents included in the electronic solicitation, including specifications, and other documents, are considered a part of the solicitation and must not be altered.

The quantities appearing in the solicitation specifications are approximate only and are prepared for the comparison of bids. Payment to the Contractor will only be made for the work accepted or for materials furnished in accordance with the contract.

The bidder is required to examine carefully the Specifications, Supplemental Specifications, contract forms, as well as any other documents contained in the solicitation. The submission of a bid shall be considered prima facie evidence that the bidder has made such examination and has judged for and satisfied him- or herself as to the character, quality, and quantity of work to be performed and material required to be furnished under the Contract. Failure to conduct such examination will not relieve the successful bidder of any obligation to furnish all material, equipment, and labor necessary to carry out the provisions of the contract.

4. PREPARATION OF SOLICITATION RESPONSE

The bidder's Solicitation Response must be submitted through the wvOASIS VSS Portal.

The bidder must furnish a unit price as called for in the solicitation, in numerical figures, for each pay item listed.

The Contractor or the Contractor's authorized agent shall use a digital signature for the Solicitation Response submission, as provided for in W. Va. Code § 39A-1-5.

The Solicitation Response shall comply with West Virginia Contractor Licensing Act, W. Va. Code § 21-11-1, et seq. The Contractor is required to have a valid contractor's license at the time of bid and throughout its work on the project.

Solicitation Responses will be considered irregular and will be rejected for any of the following reasons:

- a. When the Solicitation Response is on a form other than that furnished by the Department or if the Department-furnished form is altered and not corrected and submitted on proper form within 24 hours of request.
- b. When there are unauthorized additions, conditional or alternate bids or irregularities of any kind that may tend to make the Solicitation Response incomplete, indefinite or ambiguous as to its meaning, or when there are errors or omissions in units of measure or measures.
- c. When the bidder adds any provisions reserving the right to accept or reject an award or to enter into a contract pursuant to an award.

The Department will not consider any Solicitation Response unless it is accompanied by a digitally signed bid bond, in the amount of five percent (5%) of the bid total,

made payable to the West Virginia Department of Environmental Protection. Bid bond will be accepted only if executed on the official form furnished by the Department.

The Contractor shall submit each Solicitation Response electronically, and the wvOASIS VSS Portal must receive it by the time designated in the solicitation in order to proceed with the bid opening.

Bidders may withdraw Solicitation Responses in a manner approved by the VSS Portal, so long as it does so in the VSS Portal prior to the time and date established for bid opening. It is the responsibility of the Vendor to withdraw any bid.

Solicitation Responses will be publicly available on the Department's website on a page dedicated solely to the Department's solicitations and solicitation responses, as well as on VSS.

5. BIDDING QUESTIONS AND ANSWERS

Any questions to be asked regarding solicitations issued by the Department are to be made by contacting the DEPProcurement@wv.gov email or email listed in the solicitation for the project published on the VSS Portal. However, during the blackout period, Vendors may only contact the Department's Purchasing Section and no other Department employees with questions regarding the project. Doing so may result in the Vendor's bids being disqualified. When questions are submitted to the Department, the Vendor must provide valid contact information. If the information provided to the Department is incorrect, then the Department may not answer any questions submitted by the Vendor that supplied incorrect information.

Questions and answers are for informational purposes only. No questions or answers alter the terms and conditions of the advertised contract in question. The Department shall only issue official changes to the contract through an addendum to the applicable contract, which will be made available on the VSS Portal and which all bidders must acknowledge prior to bidding.

Potential bidders may ask technical questions of the assigned Department employee up until the deadline stated in the Solicitation for the submission of technical questions and "how to bid" questions up until the time of the posted bid closing with no exceptions.

Potential bidders may submit technical questions relating to the solicitation to the Department at DEPProcurement@wv.gov. All questions must be submitted on or before the date and time as listed in the solicitation as the technical question deadline in order to be considered.

A written response will be published in a Solicitation addendum. Non-written discussions, conversations, or questions and answers regarding this solicitation are preliminary in nature and are nonbinding.

6. **AWARD AND EXECUTION OF THE CONTRACT**

After the Department has opened and read the solicitation responses, it will compare them based on the summation of the products of the approximate quantities shown in the bid schedule by the unit bid prices. The Department will make available to the public the results of these comparisons within 24 hours of the bid opening. In the event of discrepancy between unit bid prices and extensions, the unit bid price shall govern.

The Department reserves the right either to reject any or all solicitation responses or to waive technicalities in construing the regularity of proposals submitted by vendors, provided that the technicality so waived does not change the meaning, substance or intent of the proposal, and the proposal remains unmistakably clear as to its intent and meaning. The Department further reserves the right to advertise for new proposals if, in the judgment of the Contract Administrator, the best interests of the Department will be promoted thereby.

All installed materials and equipment shall be new, and all materials, equipment, and workmanship shall be of the kind and type specified in the contract, and, in all cases, be of good quality.

The award of the contract, if it is awarded, will be made to the lowest qualified responsible bidder within 45 calendar days after the opening of solicitation responses. The Contract Administrator may, with the agreement of the successful bidder, withhold issuing the notice to proceed for any length of time. The Department will notify the successful bidder by letter, mailed to the address shown on the solicitation response, that its bid has been accepted and that it has been awarded the contract. All solicitation response guaranties will be returned immediately following the execution of the contract.

The Department reserves the right to cancel the award of any contract at any time before the execution of the contract documents by all parties without any liability against the Department.

6.1 **INSURANCE REQUIREMENTS**

6.1.1 ***COMMERCIAL LIABILITY AND COMPREHENSIVE VEHICLE LIABILITY INSURANCE***

The Contractor shall maintain commercial general liability (CGL) and comprehensive vehicle liability coverage with limits not less than one million dollars (\$1,000,000) for bodily injury and property damage for each occurrence.

6.1.2 ***WORKERS' COMPENSATION AND EMPLOYERS LIABILITY INSURANCE***

The Contractor shall also give evidence of Workers' Compensation Insurance coverage and Employers Liability Insurance coverage, with a 30-day notice of cancellation. The benefits provided under the Workers' Compensation coverage shall be benefits prescribed by State law.

The Employer's Liability policy must include coverage to protect the contractor for claims brought pursuant to the "deliberate intention" provisions of W. Va. Code § 23-4-2(d)(2). The limits of insurance under this section shall be one million dollars (\$1,000,000) for each of the following: Each Accident, Each Disease, and Each Disease / Employee.

6.1.3 *PROOF OF INSURANCE*

Prior to award of the contract, the Contractor shall provide to the Department certificates provided by the insurance company or companies issuing the insurance policies required by this Section. The certificates must include the State as an additional insured for each policy prior to the contract award. The certificates shall show the type, amount, class of operations covered, effective dates, and dates of expiration of such policies. The certifications shall provide that written notice shall be given to the Department prior to expiration, cancellation or modification of any such policy and shall contain substantially the following representation: "The insurance covered by this certificate will not be canceled or materially modified or altered, except after ten (10) days written notice has been verified as received by the Department of Environmental Protection." All certificates of insurance used to verify the policies issued must be endorsed by an agent licensed in West Virginia. The endorsement must include the printed name, street address, city, zip code, and West Virginia license number and signature of the agent. The Contractor must have continuous insurance coverage throughout the life of the contract.

6.1.4 *DEFENSE AND INDEMNIFICATION*

By executing the contract, the Contractor agrees to defend, indemnify and hold harmless the Department from all liability for personal injury, including death resulting therefrom, and against all liability for property damage sustained by any person or persons, including persons employed by the Contractor or its subcontractors, which is caused in whole or in part by an act or omission, negligent or otherwise, of the Contractor, its agents, servants or employees, and to assume the defense of any action brought by such persons to recover damages and to pay all costs and expenses, including attorney's fees, incurred by the Department as a result thereof.

6.2 *EXECUTION OF CONTRACT*

The contract shall be executed by the bidder to whom the contract has been awarded.

Failure by the bidder to execute the contract shall be just cause for the annulment of the award.

7. SCOPE OF WORK

The intent of this open-end contract is to provide for the maintenance of previously completed environmental reclamation projects. The Contractor shall furnish all labor, materials, equipment, tools, transportation, and supplies required to complete the work in accordance with the work directive, specifications, and terms of the contract.

In accordance with W.Va. Code § 5-22-1(b) (5), Provided, that no open-ended repair or maintenance contract may exceed \$500,000. Total payments under this contract will not exceed \$500,000. This includes all payments for the term of the contract including all renewals.

No work directives issued under this contract may exceed \$25,000. Projects that exceed \$25,000 will be bid as a separate construction project.

Should any misunderstanding arise as to the intent or meaning of the contract, or any discrepancy appear, the decision of the Contract Administrator shall be final.

7.1 FURNISHING RIGHT OF ENTRY

The Department is responsible for securing all necessary rights of entry in advance of maintenance. Any exceptions will be indicated in the contract.

7.2 MAINTENANCE OF TRAFFIC

The Contractor must ensure that the project does not impede traffic on public roadways.

All expenses for traffic maintenance shall be borne by the Contractor without extra compensation, except when the work directive provides for payment for efforts necessary to maintain traffic on public roadways.

7.3 ROUTINE AND FINAL CLEAN-UP

The Contractor shall at all times keep the construction site free of accumulations of waste materials and rubbish caused by its operations. Periodically during the progress of the work, and also when requested to do so by the Department, the Contractor shall remove, or cause to be removed, accumulated waste materials, rubbish, and debris and leave the construction area in good order. The Contractor shall dispose of all debris and waste resulting from work at its dump site. The Contractor shall not put or spill any materials into any drainage system that would pollute area streams or waterways. The Contractor is liable for any stream pollution caused directly or indirectly by its own employees or those of its subcontractor(s).

8. CONTROL OF WORK

8.1 AUTHORITY OF DEPARTMENT EMPLOYEES

The Engineer or Inspector has immediate charge of the work to be performed

for each maintenance project and will decide all questions that may arise as to the quantity, quality, and acceptability of materials furnished, work performed, the rate of progress of the work, and the interpretation of the work directive, any changes to the scope of work of the maintenance project, and all questions as to the acceptable fulfillment of the work directive on the part of the Contractor.

The Engineer or the Inspector has the authority to suspend the work wholly or in part, for such periods as he or she deems necessary, due to the failure of the Contractor to correct conditions unsafe for the employees or the general public or for failure to carry out orders due to unsuitable weather, conditions considered unsuitable for the prosecution of the work, or any other condition or reason deemed to be in the public interest. The Department will direct all suspension orders to the Contractor in writing.

The Inspector has charge of inspecting the work site for non-engineering related aspects of the performance of the work. Inspectors are authorized to inspect all work done and materials furnished. The inspection may extend to all or any part of the work and to the preparation, fabrication or manufacture of the materials to be used. The Inspector is authorized to call the attention of the Contractor to any failure of the work or materials to conform to the specifications. The Inspector is authorized to reject materials that do not meet specification requirements or suspend the portion of the work involved until any question at issue can be referred to the Engineer or Contract Administrator as appropriate.

The Inspector is not authorized to issue instructions contrary to the work directive and specifications. The Inspector shall not act as foreman or perform other duties for the Contractor or interfere with the management of the work by the Contractor. Any advice the Inspector may give the Contractor shall in no way be construed as binding on the Engineer or the Contract Administrator in any way or releasing the Contractor from fulfilling all of the terms of the contract.

If the Contractor refuses to suspend operations on verbal order of the Inspector, the Inspector may issue a written order giving a reason for ordering the work to stop. After the placing the order in the hands of the superintendent or other person in charge of the project for the Contractor, the Inspector shall immediately leave the work site, and the Contractor shall cease all operations.

8.2 SHOP DRAWINGS, PRODUCT DATA, AND SAMPLES

The Contractor shall review, approve, and submit to the Engineer all shop drawings, product data, and samples required by the contract documents. The Contractor shall submit them with reasonable promptness and in a sequence that will not cause delay in the work. No shop drawings, product data or samples shall be submitted to the Engineer except by the Contractor, who shall, before submission, verify all materials, check all details and measurements, and verify all field measurements, field construction conditions, and other job coordination requirements. Upon review, check, and approval by

the Contractor, it shall place its stamp of approval thereon and submit them to the Engineer.

The Contractor shall submit shop drawings, product data, and samples for work, systems, articles, items, and equipment as specified in the contract documents. At the request of the Engineer, the Contractor shall submit additional shop drawings, product data, and samples for approval.

The Contractor shall submit shop drawings, product data, and samples in sufficient number for all approvals. The Engineer shall retain at least two copies of the samples, and the Contractor shall retain the number of copies and samples as is necessary to execute the work. The Contractor shall not commence work on any part of the project that requires submission of shop drawings, product data, and samples until the Engineer has approved the submittal. All such portions of the work shall be in accordance with approved submittals.

The Contractor is not relieved of liability for any deviation from the requirements of the contract documents by the Engineer's approval of shop drawings, product data or samples, nor is it relieved of liability for errors or omissions therein.

8.3 MEASUREMENTS AND MANUFACTURER'S DIRECTIONS

Before ordering any material, product or article or doing any work, the Contractor shall take all necessary measurements at the project and is responsible for the correctness thereof.

The Contractor shall submit volume and weight measurements to the Engineer for approval and is responsible for providing all necessary volumetric and weight measurement equipment necessary to measure quantities accurately for payment of contract unit items. This equipment is subject to approval by the Engineer.

The Contractor shall apply, install, connect, erect, use, clean, condition, and put into operation or use all manufactured articles, items, products, material, and equipment as directed by the manufacturer's printed instructions, unless

otherwise specified in the contract documents, and the Contractor is responsible for obtaining all such instructions.

8.4 COOPERATION BY CONTRACTOR

The Contractor shall supervise and direct the work, using its best skills and attention. The Contractor is responsible for all maintenance means, methods, techniques, and procedures, for coordinating all portions of the work, and for cooperating with Department personnel and with other contractors in every way possible.

The Contractor shall have on the work site at all times, as an agent, a competent

superintendent capable of reading and thoroughly understanding the work directive and specifications and thoroughly experienced in the type of work being performed, who shall receive instructions from the Engineer, Contract Administrator, Inspector or other authorized representative of the Department. The superintendent shall have full authority to execute orders or directions of the Engineer, Contract Administrator or Inspector without delay and to promptly supply such materials, equipment, tools, labor, and incidentals as may be required. The Contractor shall furnish a superintendent irrespective of the amount of work subcontracted.

The Contractor shall furnish to the Engineer, or Contract Administrator and Inspector a list of addresses and telephone numbers of its personnel who may be reached in case of emergency during hours when no work is being performed. On weekends and holidays and during suspensions of work and storms, the Contractor shall alert certain of its personnel to stand by and shall inform the Engineer or Contractor Administrator and Inspector of arrangements so made.

The Contractor is responsible to the Department for the acts and omissions of its employees and its subcontractors and their employees or agents and all other persons performing any of the work with the Contractor under the contract.

8.5 COOPERATION WITH UTILITIES

The Contractor shall be solely responsible to correctly locate all existing active underground and overhead utilities at the project site and take precautions to avoid damaging them. The Contractor shall repair or replace, at its own expense, any existing utility lines it damages. The Contractor shall notify the utility companies likely to be affected well in advance and immediately before beginning any work within the project site. In the event of damage to the existing utilities or other facilities, the Contractor shall notify the affected utility owner(s) and the Engineer and Inspector immediately and make, or have made, all necessary repairs and bear the expense thereof and resulting damages caused thereby.

It is the responsibility of the Contractor to arrange for relocating the utility lines where required and as directed by the Engineer or Inspector in accordance with the guidelines set forth by the utility company, prior to beginning construction. The Contractor will be reimbursed for actual charges invoiced by the utility company. The Contractor must contact the utility companies and Miss Utility of West Virginia at least one week prior to commencement of construction activities for the purpose of field locating and marking utility owned facilities within the project area.

8.6 INSPECTION OF WORK AND MATERIALS

All materials and each part or detail of the work is subject to inspection by the Engineer or Inspector, who shall be allowed access to all parts of the work and shall be furnished with such information and assistance by the Contractor as is required to make a complete and detailed inspection. To facilitate the

inspection of materials, all delivery tickets shall contain, at a minimum, the properties required in the specifications.

The Contractor may not bury any installed components unless an Engineer or Inspector is present. Should the Contractor proceed without an Engineer or Inspector present, the work is deemed unacceptable and shall be uncovered and, at the Engineer or Inspector's direction, removed and replaced at the Contractor's expense. If any work should be covered, the Contractor must, at its own expense, if required by the Department, uncover the work so that the Department can view it and replace the work.

No work shall be done at night or on Sundays or State Observed holidays without documented prior approval of the Contract Administrator.

The Contractor shall promptly correct all work rejected by the Department as defective or as failing to conform to the contract documents, whether observed before or after final completion and whether or not fabricated, installed or completed. The Contractor shall bear all costs of correcting such rejected work. The Contractor shall remove all such defective or non-conforming work from the site, if necessary, and correct the work to comply with the contract documents at no cost to the Department. If the Contractor fails to correct such defective or non-conforming work, the Department may terminate the contract.

The Contractor shall not do any work not approved by the Engineer or Inspector. The Department will consider unacceptable any work done contrary to the instructions of the Engineer or Inspector, or any extra work done without authority, and the Department will not pay for it. The Department may order work so done repaired or removed and replaced at the Contractor's own expense.

Upon the Contractor's failure to comply promptly with any order of the Engineer or Inspector, the Engineer or Inspector has the authority to cause unacceptable work to be remedied or removed and replaced and unauthorized work to be removed, and the Department has the authority to deduct the costs from any monies due or to become due the Contractor.

8.7 PROTECTION OF WORK DURING CONSTRUCTION AND FAILURE TO MAINTAIN

The Contractor shall protect its work from damage of any kind until construction is completed and the project is accepted by the Department. This maintenance shall constitute continuous and effective work prosecuted day by day, with adequate equipment and employees to ensure that the project is kept in satisfactory condition at all times. The Contractor and its subcontractor(s) shall provide protection against weather, frost, freezing, storms, and heat and maintain all work, materials, installations, and equipment safe from injury or damage. The Contractor shall provide temporary covering and closures in the project as required to protect it from damage by weather until permanent construction provides such protection.

At no additional cost to the Department, the Contractor must replace damaged or defective work and restore or replace any other work injured or damaged during the replacement of such damaged or defective work. At the option of the Department, and without any additional cost to the Department, the Contractor shall repair or replace any masonry damage, glass breakage or other damage the Contractor caused to existing buildings or structures in the performance of the contract work or the work to repair or replace damaged or defective work.

All cost of protecting and maintaining the work during construction and before the project is accepted shall be included in the unit prices bid on the various pay items, and the Department will not pay the Contractor an additional amount for such work.

If the Contractor at any time fails to comply with provisions for maintenance during construction, the Engineer or Inspector will immediately notify the Contractor of such non-compliance. If the Contractor fails to remedy unsatisfactory maintenance within 24 hours after receipt of such notice, the Engineer or Inspector may immediately stop all work until the non-compliant condition is addressed.

9. PROTECTION OF PERSONS AND PROPERTY

The Contractor is responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the work. The Contractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection preventing damage, injury or loss to:

- a. All employees on the project and all other persons who may be affected thereby;
- b. All the work and all materials and equipment to be incorporated therein, whether in storage or off the site, under the care, custody or control of the Contractor or any of its subcontractors or their employees or subcontractors; and
- c. Other property on the site or adjacent thereto, including without limitation paving, roadways, structures, utilities, permanent property boundaries, monuments or markers not designated for removal, relocation or replacement during the course of the construction. The Contractor shall repair or replace any damage to these items at its own expense and to the satisfaction of the Department.

The Contractor shall give all notices and comply with all applicable laws, ordinances, rules, regulations, and lawful orders of any public authority bearing on the safety of persons or property or their protection from damage, injury or loss.

The Contractor shall erect and maintain, as required by existing conditions and progress of the work, all reasonable and adequate safeguards for safety and protection. The Contractor shall also post danger signs and provide other warnings against hazards and dangers as required.

In case of emergency that threatens injury, loss of life or damage to property, the Contractor must act in a diligent manner, without prior instruction from the Department. The Contractor shall notify the Contract Administrator and Inspector as soon as practicable after the emergency is abated. If the Contractor claims it is due compensation because of extra work caused by the emergency, it shall promptly submit such claim to the Contract Administrator, who has the discretion to determine whether and the amount such claim will be compensated.

10. CONTROL OF MATERIALS

10.1 TESTING

The Contractor shall perform testing as required by the Technical Specifications or as ordered by the Engineer in writing. The Engineer will determine the need, location, extent, and time of any testing herein specified or in addition to that which is herein specified.

The Contractor shall select an independent testing laboratory or utilize a laboratory run by the Contractor to perform all testing for compaction, concrete, and soils as specified herein. All laboratory reports must be signed by a Professional Engineer. The Contractor is responsible for testing payments as an incidental to the various items of the bid schedule. If the Contractor allows work to proceed beyond a testing point resulting in the disassembly of structures or the uncovering of work for testing, payment for such will be the responsibility of the Contractor at no extra cost to the Department.

10.2 QUALITY STANDARDS AND APPROVALS

The Contractor shall provide and maintain a quality control system for materials. This quality control system shall conform to all requirements of the Technical Specifications.

Notwithstanding reference in the Technical Specifications or on the drawings to any article, item, product, material, equipment or system by name, brand, make or manufacturer, such reference is intended and interpreted as establishing a standard of quality and shall not be taken, regarded or construed as limiting competition. The Department shall consider equally acceptable to that specified or referenced any article, item, product, material, equipment or system that will perform adequately and satisfactorily the duties imposed by the general design, providing the article, item, product, material, equipment or system so proposed is equal in quality, substance, design, manufacture, function, and performance as that specified or referenced and is adjudged and determined to be so in the opinion of the Engineer. The Contractor shall obtain the approval of the Engineer before purchase and installation.

Where the term “of approved manufacturer” appears in the Technical Specifications or an “approved” or “approved as equal” article or item is referred to, it means that the article, item, workmanship or material must meet

the approval of the Engineer.

10.3 DOMESTIC ALUMINUM, GLASS OR STEEL IN PUBLIC WORKS PROJECTS

If any aluminum, glass or steel products are to be supplied in the performance of this contract, only domestic aluminum, glass or steel products shall be supplied, unless the Department determines in writing, after the receipt of offers or bids, that the cost of domestic aluminum, glass or steel products is unreasonable or inconsistent with the public interest or that domestic aluminum, glass or steel products are not produced in sufficient quantities to meet the contract requirements. *See*, W. Va. Code § 5-19-2.

With regard to domestic aluminum, glass, and steel, the Department and the Contractor shall be bound by the provisions of W. Va. Code §§ 5-19-1, et seq., 5A-3-56, and any rules promulgated thereunder.

10.4 STORAGE OF MATERIALS AND EQUIPMENT

The Contractor shall store materials and equipment so as to assure the preservation of their quality and fitness for the work. The Contractor may use approved portions of the project limits for storage purposes and for placing its plant and equipment, but any additional space required therefor must be provided by the Contractor at its own expense. The arrangement of storage facilities shall be orderly and convenient and shall not obstruct movement on the site, the work of others or the construction operations.

The Contractor shall not use private property for storage purposes without the written permission of the property's owner or lessee, and the Contractor shall make that documentation available to the Contract Administrator and Inspector upon his or her request. The Contractor shall restore all storage sites to their original condition at its own expense. This shall not apply to the stripping and storing of topsoil or to other materials salvaged from the work. The Contractor shall provide adequate weather protection for any such material so stored.

The Contractor shall safely store all flammable, toxic or explosive materials in conformance with the applicable safety requirements of State and federal regulations, the safety standards of the National Fire Protection Association, and any directive of the State Fire Marshall.

10.5 SILENCE OF SPECIFICATIONS

The apparent silence of these Specifications and Technical Specifications as to any detail, or the apparent omission from them of a detailed description concerning any point, shall be regarded as meaning that the Contractor shall only use material and workmanship of acceptable quality.

11. PROSECUTION AND PROGRESS

11.1 SUBCONTRACTING THE PRIME CONTRACT

The Contractor shall not subcontract, sell, transfer, assign or otherwise

dispose of the contract or contracts or any portion thereof without written approval of the Contract Administrator prior to any of the subject work being performed. The Contractor shall not award any subcontract to a subcontractor that is under debarment with the State. All subcontracts shall be in writing and substantially conform to the prime contract. No subcontracts shall in any case release the Contractor of its liability under the contract.

As soon as practicable after the award of the contract, the Contractor shall furnish to the Department, in writing, the names of all subcontractors the Contractor proposes using on the project, including those who are to furnish materials or equipment fabricated to special design). The Department reserves the right to disapprove any proposed subcontractor whose record of performance does not establish its experience, competence or financial ability to perform the work for which the subcontract is proposed. Nothing contained in the contract documents creates any contractual relationship between any subcontractor and the Department.

The Contractor and each subcontractor shall coordinate the work and operations and shall cooperate with and assist each other on the job for the successful execution of the work within trade jurisdictional rulings. Each shall study all drawings and specifications and shall perform all work that properly comes under jurisdiction of the trade he or she represents.

The Work Directive will stipulate the date on which the Department expects the Contractor to begin work, the work required and location.

11.2 PROSECUTION OF THE WORK

The Contractor shall provide sufficient resources (materials, equipment, labor, and incidentals) to guarantee the completion of the project in accordance with the specifications and within the time set forth in the work directive.

The Contractor is responsible for all damage to property of any character during the prosecution of the work resulting from any act, omission, negligence or misconduct in the Contractor's manner or method of executing the work, or at any time due to defective work or materials. The Contractor will not be released from this responsibility until the work has been completed and the Department has accepted it.

12. LEGAL RELATIONS AND RESPONSIBILITY TO THE PUBLIC

12.1 LAWS TO BE OBSERVED

The Contractor shall, always, observe, comply with, and post as required all federal, State, and local laws, ordinances, rules, and regulations and all orders and decrees of bodies or tribunals having any jurisdiction or authority that in any manner affects those engaged or employed on the project or that in any way affect the conduct of the work. The Contractor shall protect, indemnify, defend, and hold harmless the Department from any and all claims, liabilities, and causes of action or any fines or penalties imposed on the Department by any State or

federal agency because of violation of any State or federal law, rule or regulation by the Contractor or any of its subcontractors or consultants. The Department is not liable for any citations received by the Contractor.

Failure to list a specific federal, State or local law, ordinance, rule, or regulation below does not relieve the Contractor of its obligation to comply.

12.2 PERMITS, LICENSES, AND TAXES

The Contractor shall procure all permits and licenses, pay all charges, fees, and taxes, and give all notices necessary and incidental to the due and lawful prosecution of the work. The Contractor shall provide the Department with sufficient documentation at the time of project acceptance that all applicable taxes have been paid.

12.3 SAFETY

The Contractor shall comply with all aspects of the federal Occupational Safety & Health Act of 1970 (OSHA), which was adopted by the State of West Virginia via the Division of Labor's legislative rule entitled *West Virginia Occupational Safety & Health Act*, 42 C.S.R.15. The Department is not liable for any citations received by the Contractor as a result of its failure to comply with applicable OSHA standards. Actual costs involved will be paid by the Contractor.

The Contractor shall also comply with Section 107.7 of the West Virginia Division of Highways' Standard Specification regarding public convenience and safety.

12.4 SANITARY PROVISIONS, ELECTRICITY, AND WATER SUPPLY

The Contractor shall provide and maintain in a neat, sanitary condition such accommodations for the use of its employees as may be necessary to comply with the requirements of State and local Boards of Health, or of other bodies or tribunals having jurisdiction. The Contractor shall not create, commit or maintain a public nuisance.

There are no sanitary facilities, drinking water supplies or electricity at the work site. The Contractor shall make, at its own expense, arrangements for sanitary facilities, drinking water supplies, and electricity at the site.

12.5 CONTRACTOR'S RESPONSIBILITY FOR DAMAGE CLAIMS

The Contractor shall defend, indemnify and hold harmless the Department, its officers, and employees from all suits, actions or claims of any character brought because of any injuries or damage received or sustained by any person, persons or property on account of the operations of the Contractor; or on account of or in consequence of any neglect in safeguarding the work; or through use of unacceptable materials in constructing the work; or because of any act or omission, negligence or misconduct of the Contractor; or because of any claims or amounts recovered from any infringements of patent,

trademark or copyright; or from any claims or amounts arising or recovered under the laws governing workers' compensation or any other labor law, ordinance, order or decree; and so much of the money due the Contractor under and by virtue of the contract as may be considered necessary by the Department may be retained for the use of the Department or, in case no money is due, the surety may be held until such suit(s), action(s), claim(s) for injuries or damages are settled and suitable evidence to that effect is furnished to the Department. However, the Department will not withhold money due the Contractor when the Contractor produces satisfactory evidence that it is adequately protected by commercial general liability, property damage or automobile insurance.

12.6 PERSONAL LIABILITY OF PUBLIC OFFICIALS

In carrying out any of the provisions of the contract or in exercising the power or authority granted to them by or within the scope of the contract, there is no liability upon the Secretary, Division Director, Office Chief, Contract Administrator, Engineer, Inspector or their authorized representatives, either personally or as officials of the State, it being understood that in all such matters they act solely as agents and representatives of the State.

12.7 NO WAIVER OF LEGAL RIGHTS

The Department is not precluded or estopped by any measurement, estimate or certificate made either before or after the completion and acceptance of the work and payment therefor from determining the true amount and character of the work performed and materials furnished by the Contractor, nor from determining that any such measurement, estimate or certificate is untrue or is incorrectly made, nor that the work or materials do not, in fact, conform to the contract.

The Department is not precluded or estopped, notwithstanding any such measurement, estimate or certificate or payment in accordance therewith from recovering from the Contractor such damages as it may sustain by reason of the Contractor's failure to comply with the terms of the contract. Neither the acceptance by the Department nor any payment for or acceptance of the whole or any part of the work, nor any extension of time, nor any possession taken by the Department shall operate as a waiver of any portion of the contract or of any rights reserved or of any right to damages.

12.8 LEGAL REMEDIES

Unless otherwise provided by law or elsewhere in the contract, all claims, counterclaims, disputes, and other matters in question between the Department and the Contractor shall be decided by a court of competent jurisdiction of the State of West Virginia, applying West Virginia law.

12.9 PROTECTION OF THE ENVIRONMENT AND SITE CONDITIONS

The Contractor is responsible for knowing and following all applicable environmental laws, rules, and regulations, specifically the provisions regarding

clean water and clean air. The Contractor shall examine conditions at the site and assume responsibility as to the contours and character of the earth, rock, water, and other items that may be encountered during excavating and filling operations.

The Contractor may encounter groundwater at various locations within the work site, and the Contractor may be required to divert or pump the groundwater to remove it from these locations prior to performing the work. The Contractor is responsible for the operation and maintenance of any required diversion or pumping facilities during progress of the work under the contract.

The Contractor shall take any necessary steps to prevent erosion or silting problems from occurring and to minimize pollution or sedimentation of any stream. If any such problems develop, the Contractor is responsible and shall take immediate corrective action.

The Contractor is responsible for the repair or replacement, to their original condition or better, of streets or driveways (blacktop, gravel or concrete), trees, shrubs, fences or any other physical features disturbed by the work under the contract. The Contractor is also responsible for the replacement of any existing boundary or corner markers disturbed by construction activities.

13. **DETERMINATION AND EXTENSION OF CONTRACT TIME**

13.1 **CONTRACT TIME**

The initial term of this contract is one calendar year.

Renewal Term: This contract may be renewed upon the mutual written consent of the Department and the Vendor with the approval of the Attorney General's Office only as to form. Any request for renewal must be submitted to the Department 30 days prior to the expiration date of the initial contract term or appropriate renewal term. A contract renewal shall be in accordance with the terms and conditions of the original contract. Renewal of this contract is limited to three successive one-year periods. Automatic renewal of this contract is prohibited.

Reasonable Time Extension: At the sole discretion of the Department, and with the approval of the Attorney General's Office only as to form, this contract may be extended for a reasonable time after the initial contract term or after any renewal term as may be necessary to obtain a new contract or renew this contract. Any reasonable time extension shall not exceed 12 months. The Vendor may avoid a reasonable time extension by providing the Department with written notice of its desire to terminate this contract 30 days prior to the expiration of the then-current term. During any reasonable time extension period, the Vendor may terminate this contract for any reason upon giving the Department 30 days written notice. Automatic extension of this contract is prohibited.

13.2 DEFAULT AND TERMINATION OF CONTRACT

If the Contractor:

- a. Fails to begin work as provided by the contract within the time specified in the Notice to Proceed; or
- b. Fails to perform the work with sufficient employees and equipment or sufficient materials to assure the prompt completion of the work; or
- c. Performs the work unsuitably or neglects or refuses to remove materials or to perform anew such work as may be rejected by the Engineer Inspector as unacceptable and unsuitable; or
- d. Discontinues the prosecution of the work; or
- e. Fails to resume work that has been discontinued within a reasonable time after notice by the Engineer or Inspector to do so; or
- f. Becomes insolvent or is declared bankrupt or commits any act of bankruptcy or insolvency, or allows any final judgment to stand against it unsatisfied for a period of ten days; or
- g. Makes an assignment of the contract for the benefit of creditors; or
- h. For any other cause whatsoever, fails to carry out the contract terms in an acceptable manner;

then the Contract Administrator will give notice in writing to the Contractor of such delay, neglect or default and shall set forth within that notice an explanation of how the Contractor can cure the delay, neglect or default. If the Contractor, within a period of ten days after such notice, does not proceed in accordance therewith, the Department will, upon written notification from the Contract Administrator of the failure to cure, have full power and authority, without breaching the contract, to terminate the contract.

The Department may appropriate or use any or all materials and equipment on the ground as may be suitable and acceptable and may enter into an agreement with another contractor for the completion of the contract according to the terms and provisions thereof, or use such other methods as in the opinion of the Engineer, or Contract Administrator will be required for the completion of the contract in an acceptable manner.

The Department will deduct all cost charges it incurs, together with the cost of completing the work under contract, from any money due or which may become due to the Contractor. If such expense exceeds the sum that would have been payable under the contract, then the Contractor will be liable and shall pay to the Department the amount of such excess.

14. PAYMENTS AND COMPLETION

14.1 APPLICATIONS FOR PAYMENT

The contractor shall complete the specified maintenance in accordance with each work directive. The contractor shall give an invoice to the Engineer, Contract Administrator or his or her designated representative upon completion of each work directive. Work directives will be issued in

numerical order. The Contractor shall provide documentation for hours worked, materials used, and wages paid.

Acceptance criteria is based on the Contractor completing all work as mandated in the work directive. The Contractor shall complete those items not completed as specified before the Department will make payment will be made.

14.2 **PAYMENTS WITHHELD**

The Department may decline to approve an estimate or a pay application to the extent necessary to protect the Department from loss because of:

- a. Unsatisfactory, unrepresentative, and unverified amounts and items included in pay application;
- b. Encumbering or holding an interest in the work, materials or equipment so that title cannot be passed to the Department;
- c. Defective work not remedied;
- d. Unsatisfactory performance of the work by the Contractor or any subcontractors;

When the Contractor removes the grounds for withheld payments, the Department shall approve the same for payment.

14.3 **ACCEPTANCE AND FINAL PAYMENT**

Upon notice from the Contractor that the work is ready for final inspection, the Engineer, or Inspector, as applicable, shall promptly make such inspection. At this inspection, the Contractor shall submit to the Department final quantity calculations. If the Engineer, or Inspector finds the work acceptable pursuant to the contract documents, the Contractor shall submit a pay application to the Department for processing.

The Department's processing of payment constitutes the Department's waiver of all claims, except those arising from unsettled liens, faulty or defective work appearing after the final inspection, failure of the work to comply with the requirements of the contract documents, or the terms of any special warranties required by the contract documents.

The Contractor's acceptance of final payment constitutes the Contractor's waiver of all claims, except those previously made in writing and identified by the Contractor as unsettled at the time of the final pay application. However, no payment, final or otherwise, shall operate to release the Contractor from any obligation under the contract documents.